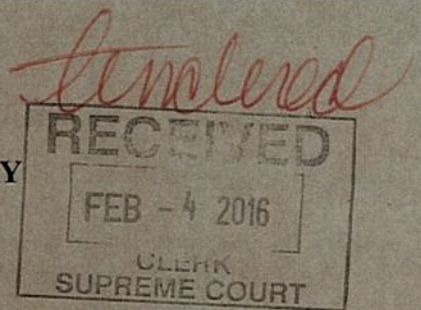


COMMONWEALTH OF KENTUCKY
SUPREME COURT
NO. 2015-SC-000144



MARY E. MCCANN INDIVIDUALLY AND
ONBEHALF OF ALL OTHERS SIMILARLY SITUATED

APPELLANTS

On Discretionary Review from the Kentucky Court of Appeals
Case No. 2014-CA-000392

v.

Appeal from Jefferson Circuit Court
Case No. 10-CI-001130

THE SULLIVAN UNIVERSITY SYSTEM, INC.
D/B/A SULLIVAN UNIVERSITY COLLEGE OF
PHARMACY, et al.

APPELLEES

**BRIEF ON BEHALF OF *AMICUS CURIAE*
UPS' CERTIFIED CLASS**

Respectfully submitted,

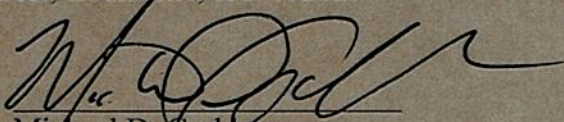
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CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of January, 2016, ten (10) copies of this motion and the \$150 filing fee were served via Federal Express upon Susan Stokley Clary, Clerk of the Supreme Court, State Capitol, Room 235, 700 Capitol Ave., Frankfort, KY 40601, with one (1) copy served upon each of the following: Sam Givens, Clerk of the Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, KY 40601; Hon. Olu Stevens, Jefferson Circuit Court, 700 W. Jefferson St., Louisville, KY 40202-4724; Grover C. Potts, Wyatt Tarrant & Combs, LLP, 500 W. Jefferson St., Ste. 2800, Louisville, KY 40202-2898; Theodore W. Walton, Clay Daniel Walton & Adams PLC, Ste. 101 Meidinger Tower, 462 S. Fourth Street, Louisville, KY 40202.


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PURPOSE AND INTEREST OF AMICUS CURIAE

The UPS' Certified Class is comprised of over 11,000 UPS hourly employees employed by United Parcel Service and UPS Supply Chain Solutions (collectively "UPS") in Kentucky who have asserted claims under KRS 337 for unpaid wages. The case has a lengthy history beginning in late 2007 when it was filed in Jefferson Circuit Court. In 2013, after finding commonality and typicality met, the Kentucky Court of Appeals reversed the Circuit Court's initial denial of class certification and remanded the case to determine whether the proposed class also satisfied the prerequisites of CR 23.01(a) and (d) and to determine if the proposed class met any or all of the CR 23.02 requirements. In 2014, in accordance with this remand mandate, the Circuit Court found the remaining CR 23.01 requirements and 23.02 requirements met. The Circuit Court certified the class, referred to herein as the UPS' Certified Class. UPS has since appealed the certification order, with the case currently pending before the Kentucky Court of Appeals (2014-CA-001496).¹

When UPS filed its notice of appeal in September of 2014, the Court of Appeals had not yet rendered its "to be published" opinion in this case ("*McCann*") in which it adopted the dicta in *Toyota Motor Mfg., Kentucky, Inc. v. Kelley*, 2013 WL 6046079 (Ky.App. Nov. 15, 2013). Now that *McCann* has been accepted for review, it is clear the Supreme Court considers whether KRS 337.385 prohibits class action an "issue of great and immediate public importance" – an issue which not only affects all private employers and employees throughout this state, but the orderly administration of justice. Given its potential impact on their Kentucky wage-hour class action, *McCann* is of substantial interest to the UPS' Certified Class members – warranting the Court considering all aspects of any decision. Ultimately, the Court's decision could impact thousands of

¹ UPS' appeal has been fully briefed. Pursuant to CR 74.02(5), the UPS' Certified Class has requested the Court of Appeals to recommend a transfer of UPS' appeal to this Court. This motion is currently pending.

Kentucky employees who are members of the UPS' Certified Class.²

As the UPS' Certified Class views this case, the narrow issue pending before this Court is whether the Kentucky Legislature exceeded its constitutional authority when it allegedly enacted KRS 337.385 to prohibit wage-hour claims from proceeding as a class action.³ See *O'Bryan v. Hedgespeth*, 892 S.W.2d 571, 578 (Ky. 1995) ("The statute is a violation of Kentucky constitutional sections mandating and elaborating on separation of powers doctrine. The statute intrudes on responsibility assigned exclusively to the judicial branch of government."); *C. C. v. Cabinet for Health & Family Servs.*, 330 S.W.3d 83, 86 (Ky. 2011) ("The power to prescribe court procedures lies with the Supreme Court."); See Ky. Const. § 116 ("The Supreme Court shall have the power to prescribe ... and rules of practice and procedure for the Court of Justice.").

"In the decades since the 1966 revision of Rule 23, class action practice has become ... a means of coping with claims too numerous to secure their 'just, speedy, and inexpensive determination' one by one. The development reflects concerns about the efficient use of court resources and the conservation of funds to compensate claimants who do not line up early in a litigation queue." See *Amchem Prods. v. Windsor*, 521 U.S. 591, 617-618 (U.S. 1997). Absent the CR 23 procedural tool for resolving numerous separate employee wage-hour claims, individual litigation would cause a significant strain on Kentucky's limited judicial resources. Furthermore, CR 23 provides an avenue whereby Kentucky employees, whose small wage-hour claims would not justify the costs to them to litigate individually, would have ready access to the courts – thereby, fulfilling

² The word "could" is applicable since there are additional reasons supporting the Court of Appeals denying UPS' appeal and affirming the Circuit Court's certification of the UPS' Certified Class (i.e. the law-of-the case doctrine, enforcement of the prior appellate mandate for which discretionary review was denied, and forfeiture due to UPS' failure to affirmatively plead or raise the disputed the statutory bar).

³ The UPS' Certified Class does not believe KRS 337.385 prohibits Kentucky employees from utilizing CR 23 as an effective and efficient procedural tool to address wage-hour claims. However, the resolution of the constitutional issue will make it unnecessary for the Court to wade into a statutory construction analysis.

the public policy of ensuring the proper payment of wages, no matter how small.

ARGUMENT

CR 23 (“class action”) is a *procedural tool* whereby a Kentucky trial court can efficiently and effectively adjudicate a multitude of cases involving the same legal or factual question in a single proceeding – thereby conserving scarce judicial resources and ensuring a consistent and timely resolution of similar claims.

“The use of the class-action procedure for litigation of individual claims may offer substantial advantages for named plaintiffs; it may motivate them to bring cases that for economic reasons might not be brought otherwise.” *Deposit Guar. Nat’l Bank v. Roper*, 445 U.S. 326, 338 (U.S. 1980). “The aggregation of individual claims in the context of a class wide suit is an evolutionary response to the existence of injuries unremedied by the regulatory action of government. Where it is not economically feasible to obtain relief within the traditional framework of a multiplicity of small individual suits for damages, aggrieved persons may be without any effective redress unless they may employ the class-action device.” *Id.* at 339. A CR 23 class action is not simply “an invitation to joinder”, but instead is “a truly representative suit designed to avoid, rather than encourage, unnecessary filing of repetitious papers and motions.” *Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 550 (1974). “Class actions serve an important function in our system of civil justice.” *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 99 (1981).

With the foregoing policies in mind, the Amicus Curiae submit the Court should continue to embrace the efficiencies and economies of scale provided by CR 23 as applied to wage-hour claims involving Kentucky employees.

We note also that the class action is a creation of the courts, not the legislatures, hence its foundation in this country is in the court-established civil rules, rather than the statutes. As was the case in England, class actions in the United States are an outgrowth of the compulsory joinder rule that prevailed in courts of equity.... As such, *courts enjoy wider latitude in determining public policy regarding class actions and fashioning remedies in this type of litigation.*

Schuerle v. Insight Communs., Co. L.P., 376 S.W.3d 561, 569, n7 (Ky. 2012) (emph. added).

I. KENTUCKY’S CONSTITUTION PROHIBITS THE LEGISLATURE FROM CONTROLLING THE EFFICIENT ADMINISTRATION OF CASES BY THE TRIAL COURTS.

The power to prescribe and enforce court rules and procedures lies exclusively with the Courts. This power is absolute. Pursuant to Kentucky’s Constitution, the “Supreme Court shall have the power to prescribe ... and rules of practice and procedure for the Court of Justice.” Ky. Const. § 116.⁴ This division of constitutional authority was expressly addressed and recognized by this Court in *C.C. v. Cabinet for Health & Family Svcs.*, 330 S.W.3d, 83, 86 (Ky. 2011) (“The power to prescribe court *procedures* lies with the Supreme Court.”) (emph. added); *see also*, *Elk Horn Coal Corp. v. Cheyenne Res., Inc.*, 163 S.W.3d 408, 422 (Ky. 2005) (“the Kentucky Constitution undeniably delegates *exclusively to this Court* the authority to adopt *rules of practice and procedure* for the Court of Justice”) (emph. added). Kentucky’s Legislature publicly recognized that rules of civil procedure are exclusively within the province of the Judiciary Branch – Kentucky’s Supreme Court.

The method of bringing a judgment, order or decree of a lower court to the Supreme Court for review *shall be established by Supreme Court rule*. The procedures for appellate review shall be established by *the Rules of Civil Procedure*, Rules of Criminal Procedure and other rules *promulgated by the Supreme Court*.

See KRS 21A.050(2) (emph. added). The Legislature further prohibits itself from encroaching on the courts’ rulemaking authority. *See* KRS 447.154 (“Nor shall any statute be construed to limit in any manner the power of the Court of Justice to make

⁴ Amicus Curiae submit that KRS 337.385 does not expressly prohibit wage-hour class actions by Kentucky employees, especially given its recognition that wage-hour claims may be maintained by multiple plaintiffs (“behalf of ... themselves”). *See* KRS 337.385(2). Should the Court agree and reverse on this basis, it is unnecessary to resolve the constitutional issue. *See Dreamers, LLC v. Don's Lumber & Hardware, Inc.*, 366 S.W.3d 381, 384 (Ky. 2011) (“a court should not resolve a question on constitutional grounds if other legal grounds will address the problem.”).

rules governing practice and procedure in the courts.”).

Despite the constitutional separation of powers, and without discussion or mention of Ky. Const. §116, the Court of Appeals held that the Legislature had in fact enacted legislation concerning the rules of practice and procedure in Kentucky’s courts. *See McCann v. Sullivan Univ. Sys.*, 2015 Ky. App. Unpub. LEXIS 862 (Ky.App. Feb. 27, 2015).⁵ The Court of Appeals did not address the constitutional issues. Instead, it only cited to CR 1 for the proposition that the Legislature could invade the Judicial Branch’s province if the legislation “created a special statutory proceeding.” *Id.* at *7. This finding was not supported by any analysis, but was offered solely as a legal conclusion. The Court of Appeals also did not address the Legislature’s *specific and controlling* legislative acknowledgment contained in KRS 21A.050(2) or in KRS 447.154. These statutes are specific and controlling. *See Light v. City of Louisville*, 248 S.W.3d 559, 561 (Ky. 2008) (“based upon a primary rule of statutory construction that when two statutes are in conflict, the more specific statute controls the general.”). The Court of Appeal’s ruling was incorrect and requires reversal.

A. KRS 337.385(2) is not a special statutory proceeding.

As this Court held in *Cabinet for Health Family Svcs.*, CR 1 controls all proceedings in Kentucky’s trial courts. 330 S.W.3d at 86 (“the Civil Rules still apply to such proceedings”). The only exception is if Kentucky’s Legislature has prescribed conflicting procedures thereby creating “special statutory proceedings.” *Id.* “[S]pecial statutory proceedings replace Civil Rules only where they are ‘inconsistent’ or in conflict with the rule.” *Id.* (quoting *West v. Goldstein*, 830 S.W.2d 379, 383 (Ky. 1992)).⁶

⁵ Amicus Curiae recognize unpublished cases are not to be cited except as provided by CR 76.28(4)(c), which is applicable to this case.

⁶ *See also, Simmons v. Taylor*, 451 S.W.2d 385, 389 (Ky. 1970) (“CR 1 provides that the civil rules do not govern procedure and practice in any special statutory proceeding to the extent that the rules are inconsistent or in conflict with the procedure and practice provided by the applicable statute.”).

Contrary to the Court of Appeal’s opinion, KRS 337.385(2) is not a “special statutory proceeding.”

A “special statutory proceeding” is one that is “*complete within itself having each procedural detail prescribed.*” *Swift & Co. v. Campbell*, 360 S.W.2d 213, 214 (Ky. 1962) (emph. added). An example of a special statutory proceeding was addressed in *Cabinet for Health Family Svcs.* 330 S.W.3d at 87 (discussing the Uniform Juvenile Code). This Court found that “the procedures for DNA actions are *laid out in detail* in KRS Chapters 610 and 620.” *Id.* (emph. added). Notably, Section 610 of the Unified Juvenile Code is entitled “Procedural Matters.” Section 610 contains legislative directives on jurisdiction, procedures for treating a child as an adult, conducting hearings, limitations on evidence, appeals to the Circuit Court, required findings, court records, and fees. *See generally* KRS 610.

Unlike KRS 610’s detailed procedures for the Kentucky trial court’s resolution of juvenile issues, KRS 337.385(2) does not lay “out in detail” the statutory proceedings applicable to a wage-hour claim. In fact, the statute does not lay out any, let alone special, procedural processes. KRS 337.385(2) simply makes it clear that the right to enforce Kentucky’s wage-hour laws is *not vested solely* in the state administrative agency – the “Commissioner.”⁷ Kentucky employees also have the right to enforce their claims in Kentucky’s trial courts. *Id.* The statute does not provide any procedural process for resolving wage-hour claims in the courts. At best, assuming the statute is read to prohibit class actions, there still is no detailed statutory proceeding. A summary prohibition on a procedural tool, without more, does not constitute a “special statutory proceeding” that is “complete within itself having each procedural detail prescribed.” *Campbell*, 360 S.W.2d at 214 (Ky. 1962). Absent this detailed procedural process, any limitation on the

⁷ “Commissioner” means the commissioner of the Department of Workplace Standards under the direction and supervision of the secretary of the Labor Cabinet. *See* KRS 337.010(1)(a).

Kentucky trial court's use of CR 23 is expressly prohibited by Ky. Const. §116, as well as by CR 1, KRS 21A.050(2), and KRS 447.154.

B. Even if KRS 337.385(2) is a “special statutory proceeding,” it does not conflict with CR 23.

Contrary to the Court of Appeals opinion that KRS 337.385 limited “who may bring claims for unpaid wages”,⁸ the plain language of the statute dictates otherwise. Accepting the Court of Appeals interpretation, KRS 337.385(2) would only prohibit a “class action.” It clearly would not prohibit a Kentucky employee from pursuing an identical wage-hour claim, against the same employer, and based on the same relevant facts. The statute specifically used the plural pronoun “themselves”, thereby confirming a Kentucky trial court is not legislatively prohibited from allowing multiple plaintiffs to proceed in the same lawsuit. *Id.* Nothing would preclude a party from invoking CR 19.01 requiring mandatory joinder of all persons necessary to eliminate the “risk of ... inconsistent obligations” for the parties – ***mirroring the CR 23*** objective and goal of ensuring consistent adjudications with respect to the same claims and establishing compatible standards of conduct. *See* CR 23.02(a)(i). Pursuant to CR 19.01, Kentucky employees would undoubtedly be proceeding as “themselves.”

In *Cabinet for Health Family Svcs.*, this Court found that the Civil Rules on discovery did ***not*** conflict with the detailed discovery rules contained in the Uniform Juvenile Code.

These short time frames, however, ***do not present a conflict between the statutory requirements*** of DNA actions and the Civil Rules. Neither the Civil Rules nor the DNA statutes are rigid or blunt instruments. ***Both include provisions allowing*** for flexibility as to time frames—a safety valve, of sorts— which should alleviate much, if not all, of the perceived conflict between them.

330 S.W.3d at 87 (emph. added). The same holds true here.

The Legislature clearly provided Kentucky employees with substantive wage-

⁸ *McCann*, 2015 Ky. App. Unpub. LEXIS 862 at *7.

hour rights, and expressly provided them with the right to seek private relief. The Civil Rules provided the judicial procedural mechanism for Kentucky employees to pursue and to ultimately enforce their wage-hour rights and claims. There is no conflict on this point. Further, the Legislature recognized that multiple employees may have the same claim and as such could enforce their claims (i.e. “themselves”). Similarly, the Civil Rules provide for the efficient administration of wage-hour claims via either CR 19 or CR 23 – allowing Kentucky employees to enforce wage-hour claims “themselves.” Regardless of the civil rule, the right to pursue wage-hour claims remains the same. Both KRS 337.385 and CR 23 have “*provisions allowing for flexibility*” as to Kentucky employees seeking to enforce their wage-hour rights and claims. Certainly, if this standard was sufficient to merit the Court finding no conflict in *Cabinet for Health Family Svcs.*, the same should hold true here as well.

Whether Kentucky employees’ wage-hour claims proceed under the CR 19 mandatory joinder rules, or by using the more efficient and economical CR 23 class procedure, the final result is the same. Wage-hour claims would be resolved on a representative basis for each affected Kentucky employee. There is no conflict between CR 23 and KRS 337.385(2).

C. Any substantive limitation on wage-hour rights and/or remedies would be unconstitutional.

The final constitutional issue concerns whether KRS 337.385(2)⁹ seeks to impose a procedural requirement or whether it is substantive. The Court of Appeals did not expressly find one way or the other, stating “[t]he language in KRS 337.385 specifying who has standing to pursue an action for unpaid wages, however, is not a mere procedural provision.” *McCann*, 2015 Ky. App. Unpub. LEXIS 862, *7. As the U.S. Supreme Court held in *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559

⁹ KRS 337.385 merely served to codify a Kentucky employee’s common law contractual right to recover agreed upon but unpaid wages.

U.S. 393 (2010), a statutory limitation on whether a claim may proceed via class action is purely procedural. *Id.* at 416 (“The New York law at issue ... is a procedural rule that is not part of New York's substantive law.”).

By its terms, the provision precludes a plaintiff from ‘maintain[ing]’ a class action seeking statutory penalties. ***Unlike a law that sets a ceiling on damages*** (or puts other remedies out of reach) in properly filed class actions, § 901(b) says nothing about what remedies a court may award; ***it prevents the class actions it covers from coming into existence at all.***

Id. at 401 (emph. added). However, even if the Court of Appeals’ murky opinion is read to conclude that KRS 337.385(2) is a substantive limitation on wage-hour rights and remedies, the language is unconstitutional for a separate reason.

Pursuant to Ky. Const. §54, “[t]he General Assembly shall have no power to limit the amount to be recovered for injuries resulting in death, or for injuries to person or property.” *See O’Bryan v. Hedgespeth*, 892 S.W.2d 571, 578 (Ky. 1995) (“[I]f we were to assume this statute intends ***a substantive rule limiting the damages*** recoverable in a civil action, ***the statute is constitutionally defective*** under Section 54 of the Constitution.”) (emph. added). Any substantive limitation by the Legislature on whether a wage-hour claim can be brought as a class-action would necessarily impact the damages to be recovered in a particular case. It would similarly impact an individual’s potential damages by requiring the individual to fully bear the costs of litigation, whereas a class action would spread the costs over multiple and similarly situated individuals – thereby increasing their respective damages.

The policy at the very core of the class action mechanism is to ***overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights.*** A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone’s (usually an attorney’s) labor.

Schmuerle, 376 S.W.3d at 568-569 (emph. added). Because the rule would substantively limit damages, it is “constitutionally defective” and unenforceable. *Hedgespeth*, 892 S.W.2d at 578.

Finally, comity does not alter the analysis. Comity refers to a judicial adoption of an otherwise unconstitutional statute. *Id.* at 577. It is an “institutional policy reserved for the Supreme Court.” *Id.* (citing SCR 1.010; 1.020(1)(a)). However, for comity to be warranted the “practice and procedure legislatively prescribed [must] enhance rather than impair the judicial function.” *Id.* As further discussed, allowing KRS 337.385(2) would not enhance the judicial function. *See infra*, Part II. To the contrary, it would create a significant impediment to the Kentucky trial court’s discretionary administration of multiple wage-hour claims involving the same parties, the same claims, and the same facts – detrimentally impacting the efficient and economical administration of a court’s civil docket. Moreover, it would impair Kentucky employees from efficiently and economically enforcing their substantive wage-hour claims.

The right of every individual in society to access a system of justice to redress wrongs is basic and fundamental to our common law heritage, protected by Sections 14, 54 and 241 of our Kentucky Constitution.

Id. at 578. Comity is neither warranted nor proper in this case. *Id.* (“[W]e reject any notion that it should be absorbed as judicial doctrine as a matter of comity.”).

II. IF UPHELD, MCCANN WILL HAVE A DEVASTATING IMPACT ON KENTUCKY’S ALREADY OVERBURDENED JUDICIAL SYSTEM.

Any analysis as to whether this Court should abdicate, in part, its constitutional authority to control its “court procedures” must necessarily consider the practical impact on Kentucky’s courts. *See C.C. v. Cabinet for Health & Family Svcs.*, 330 S.W.3d, 83, 86 (Ky. 2011) (“The power to prescribe court procedures lies with the Supreme Court.”). If this Court concludes that Kentucky Courts cannot use the CR 23 procedural tool to efficiently and effectively resolve a KRS 337.385 wage-hour dispute, the resulting impact will be devastating to the trial court civil caseloads. A pragmatic and very real example would be the immediate impact on Jefferson Circuit Court’s already overburdened civil case load. The decertification of the UPS’ Certified Class would result in well over 11,000 individual civil cases being filed in Jefferson Circuit Court alone.

Circuit Court Case Load ¹⁰			
Jefferson Circuit	Filings ¹¹	UPS Class ¹²	Increase
2014	7,738	11,000	142%

With just one case, *Jefferson Circuit civil docket case load would more than double.*

It is no secret that Kentucky's courts are significantly underfunded and overburdened *with the existing case load.* Concerns as to this issue have been repeatedly voiced in the media, as well as by this Court.

The *underfunding of state courts* impacts not only the prompt and fair resolution of disputes, but also public safety, the economy and our very system of government.¹³

... Since the recession began in 2008, the *Judicial Branch has sustained cumulative reductions of nearly 50 percent of our operating budget.* Over the last five years, deep cuts to our base budget have forced us to cut positions, furlough employees, abolish programs and trim operating costs. The ability of the Judicial Branch to carry out its constitutional and statutory duties is *seriously compromised without the appropriate level of funding.*¹⁴

The underfunding problem is not getting any better. In its budgetary requests, this Court has consistently "made it known that [a] priority ... is to secure funding to

¹⁰ See http://courts.ky.gov/aoc/statisticalreports/Documents/CaseloadbyCounty_Circuit.pdf.

¹¹ The average civil filings for Jefferson Circuit from 2007 through 2014 is 11,122. These prior year filings are statistically inflated as a direct result of the large number of mortgage foreclosures and similar filings following the 2007 financial market collapse – as evidenced by the subsequent downward trend in civil filings. However, even if the average is used, the impact of disallowing CR 23 as a procedural tool, would result in a 100% increase in Jefferson Circuit's civil case load.

¹² This figure is a conservative estimate based on UPS' representation of the number of active employees. The number does not include UPS' terminated employees during the applicable limitations period – a number that will reasonably increase the class size threefold or more.

¹³ Chief Justice John D. Minton Jr.'s marks from the Kentucky Law Day celebration in Frankfort. See <http://courts.ky.gov/courts/supreme/Pages/MintonNOI.aspx>. (emph. added).

¹⁴ See Judicial Branch Budget Request: Priorities for FB 2014-2016, p.3, http://courts.ky.gov/Documents/Newsroom/CJMintonBudgetReviewSubcommittee_020414.pdf.

address the Judicial Branch's broken compensation system. Years of neglect have left Judicial Branch salaries woefully behind those in the private sector and the Executive and Legislative branches of state government."¹⁵ Because of inadequate funding by the Kentucky Legislature, a quarter of the Kentucky's judicial workforce (non-elected employees) "fall under the federal poverty guidelines for a family of four."¹⁶

Equally disheartening is that *an even greater number of court personnel qualify for food stamps*. It is simply unacceptable that so many of our employees work full time and still *live in poverty*.¹⁷

Significantly increasing the work load for Kentucky's judicial employees will only exacerbate an already precarious and unacceptable compensation system.

As with Kentucky's judicial employees, Kentucky's judicial bench has been similarly woefully undercompensated for their current case load. "[I]t has been a decade since Kentucky's justices and judges have received a measurable increase in compensation."¹⁸ The direct result of the Legislature's failure to provide the requisite funding necessary to ensure reasonable and market competitive compensation for Kentucky judges is a "Judicial Branch brain drain."¹⁹ The Judicial Branch cannot "withstand the enticement of higher salaries being offered by the private sector and the other branches of government."²⁰ "The ongoing turnover places a *very real strain* on the courts as [it] struggle[s] to maintain a workforce that can continue to provide a high level of service."²¹

Equally troubling is that low salaries have been compounded by recent reductions in pension benefits for the new judges coming on board. This decline, if unchecked, could have a long-term effect on Kentucky's ability to attract exceptional lawyers to

¹⁵ *Id.*, p.2.

¹⁶ *Id.*

¹⁷ *Id.* (emph. added).

¹⁸ See State of the Judiciary Address: 2015 a Seminal Year for Kentucky Courts p.10, <http://courts.ky.gov/Documents/Newsroom/CJMintonSofJ11615.pdf>.

¹⁹ See Judicial Branch Budget Request: Priorities for FB 2014-2016, p.2.

²⁰ *Id.*

²¹ *Id.*

judicial office. Judges make far-reaching decisions every day and everyone who comes before *the courts must have confidence in the abilities of those sitting on the bench.*²²

As with the Judiciary employees, significantly increasing the work load for Kentucky's already overworked and underpaid judicial bench will only exacerbate an already precarious and unacceptable funding problem.

If affirmed, *McCann* will significantly and negatively constrain the efficient and orderly administration of civil justice in Kentucky's trial courts. It will unwind existing cases proceeding procedurally as CR 23 class actions, resulting in a multitude of duplicative litigation – wasting scarce judicial resources and unnecessarily raising the significant likelihood of inconsistent decisions.²³ The economic reality supporting the need for Kentucky trial courts to have CR 23 as a procedural tool for resolution of numerous wage-hour and duplicative wage-hour claims is undeniable.

We agree that the purpose of the class action under CR 23 is to provide a remedy for the very concerns that Appellants raise. The practical effect of *de minimis* claims situations has been explained in other cases addressing class action litigation. *'Economic reality dictates that [litigation involving many small claims] proceed as a class action or not at all.'*

Schnuerle, 376 S.W.3d at 568 (quoting *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 161 (1974) (emph. added)).

The Court should not view *McCann* in a legislative interpretative vacuum. Kentucky's Constitution is clear that this Court, not the Legislature, dictates court procedures for Kentucky's trial courts. *See Cabinet for Health & Family Svcs.*, 330 S.W.3d at 86; Ky. Const. §116 ("The Supreme Court shall have the power to prescribe ... and rules of practice and procedure for the Court of Justice."). Allowing the same body, the Legislature, to dictate the rules of this Court while at the same time withholding the requisite resources to apply the legislated rule (e.g. a KRS 337.385 prohibition on class actions) will only lead to absurd results and place an unreasonable

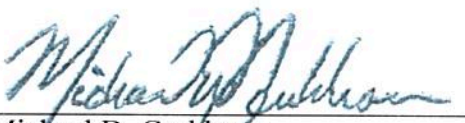
²² See State of the Judiciary Address: 2015 a Seminal Year for Kentucky Courts, p.9.

²³ See CR 23.02(i).

burden on Kentucky's Judiciary Branch. The Court should continue to permit Kentucky's trial courts the necessary discretion to direct the orderly and efficient process of their civil case load, including using CR 23 to resolve KRS 337.385 wage-hour claims.

CONCLUSION

This case is of substantial interest to the *Amicus Curiae* UPS' Certified Class, including the thousands of Kentucky hourly employees they represent. *Amicus curiae* share a common interest in advocating for and protecting the rights of Kentucky employees, including the right to be paid fairly and in accordance with KRS 337.385(2). If the Court of Appeals' opinion is affirmed, Kentucky's trial courts will be prohibited from utilizing CR 23 as procedural tool for the efficient and economical resolution of KRS 337.385 wage-hour claims. For these reasons, and the reasons set out more fully in this brief, *Amicus Curiae* respectfully request that the Court reverse the Court of Appeals' decision and remand to Jefferson Circuit Court with instructions that the *McCann* plaintiffs' KRS 337.385 wage-hour claims may proceed as a class action – subject to meeting the requisite CR 23 elements.



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